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Testimony of Senator Lena C. Taylor
Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
2009 SB 332—Submission of custody study reports in accordance with rules of evidence
Tuesday, November 10, 2009

Honorable members of the committee,

Thank you for taking testimony relating to Senate Bill 332, an act relating to the submission of custody study reports.

Divorce, parental separation, and other legal actions that involve the awarding of custody of minor children to one or both parents are some of the most potentially traumatic experiences a child can face. These decisions not only affect the relationship between child and parent, however. The custody award can also profoundly shape the way in which the parents interact with each other. This bill seeks to increase transparency in the placement of minor children by requiring that the custody study report be submitted to both parents and the court in accordance with the rules of evidence. In doing so, Senate Bill 332 aims to reduce the stress on the family as it undergoes its transition.

Under current law, families undergoing actions such as divorce or legal separation may come to an agreement on legal custody of children. If no agreement can be reached, a court may initiate a legal custody or physical placement study to investigate the family's situation. This study, which examines such key issues as the conditions of the child's home, each legal parent's performance of duties relating to the child, and whether either party has committed acts of battery or domestic abuse, is submitted to the court, and is intended to address matters relevant to the best interest of the child. Though the recommendations of the investigators are based, in part, on the wishes of the child's parents, the wishes of the child, the interaction of the child with his or her parents and siblings, and other subjective measures of adjustment, communication, and interpersonal relations, this information is not made available to those it most affects: the family itself.

Senate Bill 332 seeks to fix the lack of openness in the custody-awarding process. SB 332 would require those who conduct the legal custody or physical placement studies to provide a copy of the recommendations to the court and to the parents 10 days before the date of the hearing. SB 332 requires that these recommendations be introduced in accordance with the rules of evidence standard in civil cases. In other words, the person making the recommendations must appear in court to explain the observations underlying the recommendations and to take the parents' questions regarding the legal custody study.

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Committee on Justice Reinvestment Initiative Oversight (Chair)

Joint Committee on Finance
Joint Committee for Review of Criminal Penalties (Co-Chair)
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TO: Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

FROM: Bob Andersen Bob Andersen

RE: SB 332, relating to submitting custody reports to the parties and offering custody study reports in accordance with the rules of evidence

DATE: November 10, 2009

SB 332 simply requires that custody studies reports in family law actions be introduced in accordance with the rules of evidence, so that the parties may have a chance to ask the person who made the report how the recommendations were made. Under current law, the statute says only that the reports are to be given to the courts and that the courts may make the reports a part of the record. SB 332 provides that the reports must be given to the parties and the court 10 days in advance of the hearing.

While this is a small bill, it relates to a subject matter that has ***profound importance*** – because it relates to studies and reports that are made that can determine how ***physical placement*** and ***legal custody*** over ***children are to be divided between the parents in a family law action***. While it is a small bill, it makes vitally important changes in the law.

This is a bill that passed the Assembly unanimously last session, but that raised a concern that prevented its passage. That concern has now been resolved by SB 332.

The Office of the Director of State Courts was concerned that the recommendations from custody studies could not be made available to the courts until those recommendations were introduced in evidence. Their concern was that this would delay the process. Consequently, the proposal has been amended to provide that the recommendations must be given to the courts, as well as the parties,10 days in advance of the hearing. Under the amendment, the courts may review the recommendations but may not rely upon the reports as evidence until the reports are introduced in accordance with the rules of evidence. This amendment has been reviewed by the Office of the Director of State Courts and their legislative committee and they now remove their objections to the bill.

This is a bill that is supported by the broad range of diverse interest groups that get involved in family law legislation: LAW, the Wisconsin Coalition Against Domestic Violence, the Family Law Section of the State Bar and organizations that represent the interests of fathers.

1. **Under Current Law, Recommendations Regarding Legal Custody and Physical Placement in Family Law Actions May Be Automatically Incorporated in the Record, Without Giving Either of the Parties the Opportunity to Question How Those Recommendations Came About.**

Current s. 767.405 (14)(a) and (b) provide as follows:

(14) Legal custody and physical placement study.

(a) ***A county or 2 or more contiguous counties shall provide legal custody and physical placement study services***. The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, ***the court may order a person or entity designated by the county to investigate the following matters relating to the parties:***

1. The conditions of the child's home.

2. Each party's performance of parental duties and responsibilities relating to the child.

3. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

4. Any other matter relevant to the best interest of the child.

(b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit the results to the court. The court shall make the results available to both parties. The report shall be a part of the record in the action unless the court orders otherwise.

Under par. (b), the results of the investigation are to be submitted to the court. There is no provision for the parties to question the person who conducted the investigation or made the report. The court can automatically make this report a part of the record.

2. **Senate Bill 332 Would Amend Paragraph (14)(b) to Require that the Report be Given to the Parties 10 days in Advance, to Require that the Investigator Who Made the Report Introduce the Report in Evidence, and to Allow the Parties to Question the Investigator About the Contents of the Report.**

The bill achieves two very important reforms:

- It requires that the report be introduced in accordance with the rules of evidence, which means that the person who conducted the report must appear in court to explain how the recommendations were arrived at and the parties are given the opportunity to question the person.

- It requires that the parties be given the report 10 days in advance, so that the parties have time to examine the basis for the recommendations and to obtain evidence that is relevant to those recommendations.

3. **The Custody and Placement Studies are Conducted by a Family Court Services Office or by Any Person or Public or Private Entity Contracted with by the Director of Family Court Services**

Under s. 767.405 (14) (a), the custody and placement studies may be performed by the entities described above, as is the case for mediation. Each county – or two or more contiguous counties – appoints a Director of Family Court Services. A person who conducted mediation may not engage in the custody and placement investigation under this section, "unless each party personally so consents by written stipulation after mediation has ended and after receiving notice from the person who provided mediation that consent waives the inadmissibility of communications in mediation under s. 904.085."

4. **The Interests at Stake for the Parties are Profound as The Recommendations of the Studies Can Influence or Determine Who Will Have Legal Custody and Who Will Have Physical Placement for What Period of Time.**

The definitions of legal custody and physical placement show how profound those interests are. They highlight the importance of the recommendations that are being made.

Under 767.001(2), "Legal custody" means:

> (a) With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make ***major decisions*** concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

Under 767.001(2m) "Major decisions" means

> (2m) ***"Major decisions"*** includes, ***but is not limited to***, decisions regarding ***consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for non emergency health care and choice of school and religion***.

(5) *"Physical placement"* means the condition under which a party has the ***right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care,*** consistent with major decisions made by a person having legal custody.

Legal custody and physical placement can be sole or joint or shared in any manner of ways.

5. **The Investigation Required by the Statute is All-Encompassing**

Under the statute, the entity is to investigate all of the following in investigating the parties. These are significant matters.

- ***The conditions of the child's home.***
- ***Each party's performance of parental duties and responsibilities relating to the child.***
- ***Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).***
- ***Any other matter relevant to the best interest of the child.***

This covers the gamut of circumstances that involve the parents' lives and the lives of their children.

In addition, under s. 767.41 (5), all of the following factors have to be taken into consideration in awarding legal custody and physical placement, so the entity doing the custody and placement investigation will be involved in a broad investigation.

- The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
- The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
- The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable

past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

- The child's adjustment to the home, school, religion and community.

- The age of the child and the child's developmental and educational needs at different ages.

- Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.

- The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

- The availability of public or private child care services.

- The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

- Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

- Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).

- Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child or any other child or neglected the child or any other child:

  a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

  b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

- Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

- Whether either party has or had a significant problem with alcohol or drug abuse. The reports of appropriate professionals if admitted into evidence.

- Such other factors as the court may in each individual case determine to be

6. **By Receiving the Report 10 Days in Advance, the Parties Will be Able to Assess the Recommendations that are Made, Assess the Evidence Upon Which Those Recommendations are Made, and Prepare Evidence that May be Submitted to Challenge Some of Those Recommendations and Matters of Evidence.**

7. **These are Profound Interests for Parents that Will be Affected by Judgments and Orders that Can Last for Many Years.**

These are profound interests for parents. Without any question being given to these recommendations, the court may simply incorporate the recommendations into the record. Those recommendations will likely result in orders and judgments being entered to enforce the recommendations. Once judgments or orders are entered, they are difficult to undo at a later stage.

Under s. 767.451, legal custody and physical placement orders may not be revised within two years after they are initially entered, unless a party can show by substantial evidence that a modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.

After two years, these same orders ***may not be modified unless there is a change in circumstances that is substantial enough to overcome a presumption that favors the current allocation of custody and placement*** – in the best interest of the children. A change in economic circumstances or marital status of either party is not sufficient to meet the standards for modification.

In the end, the safeguards proposed by SB 332 are just a matter of simple fairness.

Testimony before the
Senate Committee on Judiciary, Corrections, and Housing
SB-332
Testifying in Favor
11-10-09
Submitted by
Steve Blake
Representing
Wisconsin Fathers for Children and Families

My name is Steve Blake and I am the president of Wisconsin Fathers for Children and Families. WFCF supports this bill and urges the committee to recommend it's passage.

Custody studies in divorce cases or placement disputes have such a profound impact on the fundamental liberty interests of parents to the care, custody and control of their children that I find it surprising that they have not been subject to the rules of evidence already. Those who prepare custody studies need to explain how and why they have made the recommendations that they have and certainly should have to answer questions that a parent or their counsel may have concerning the method used and the circumstances that led to the conclusions reached.

It is definitely in the best interest of children that each parent have the opportunity to participate as fully as possible in their care and upbringing and if a custody evaluator recommends differently they should have to give a full accounting as to why their recommendations find that it is not.

Wisconsin Fathers for Children and families believes that the best parent is both parents. Anything that interferes with that concept should be subject to the closest possible scrutiny. Therefore my organization urges this committee to recommend passage of SB-332.

Respectfully submitted,

Steve Blake
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